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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/821,376	03/29/2001	David Kcc Yang	8491	3463
27752	7590	12/17/2003		
THE PROCTER & GAMBLE COMPANY INTELLECTUAL PROPERTY DIVISION WINTON HILL TECHNICAL CENTER - BOX 161 6110 CENTER HILL AVENUE CINCINNATI, OH 45224			EXAMINER SHERRER, CURTIS EDWARD	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 12/17/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/821,376

Applicant(s)

YANG ET AL.

Examiner

Curtis E. Sherrer, Esq.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09/22/03.
- 2a) ☒ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6,8-11,13-18 and 20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6,8-11,13-18 and 20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
- a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

This final action is being issued to more clearly define the rejections.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-6, 8-11, 13-18 and 20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "about" in claim 1 and others is a relative term, which renders the claim indefinite. The term "about" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

In response to the above rejection, applicants state that case law provides support for the use of terms "about" and "approximately." Nevertheless, MPEP 2173.05(b) states that if the specification does not provide scope for relative terms, i.e., "about," then it must be determined whether one of ordinary skill in the art would be reasonably apprised of the scope of the invention. Currently, there is nothing on the record to show that one of skill would know the scope of a phrase such as "about 0.1 % to about 10 % total fructose" or "about 55." Therefore, the rejections are maintained.

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Further, applicants argue the criticality of the above claimed ranges. (See Brief, page 7, bottom). If these ranges are indeed critical, then applicant must inform the public as to the scope of the instant invention with respect to these ranges.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-6, 8-11, 13-18 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Product Alert (v. 28, no. 11) in view of applicants' admissions (pages 1-2).

Product Alert teaches that cited in previous Office Actions. At this time, the Glycemic Index (GI) of Cinagro has not been determined. It is inherent that fructose itself has a GI of 25-35. All of the ingredients listed to be in Cinagro are less than 55 and therefore it is inherent that the GI is that which is claimed.

Further, applicants admit that foods with a high Glycemic Index should be avoided because they cause increased blood glucose levels and this causes increased insulin levels and this, in turn, results in the conversion of the blood glucose to fat, thereby increasing energy storage by way of fat accumulation. Therefore, it would have been obvious to optimize the GI of the Product Alert beverage so that it was as low as possible, and thereby lower the effects of the beverage on a consumer's blood glucose level.

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It is noted that the claims are not restricted to GI level of specifically 55 or less or a fructose level of 10% because these ranges are modified by the use of the term “about” and, therefore, the claimed product could have some unknown higher values than those relied on in applicants’ arguments.

Response to Arguments

Applicant's arguments filed 09/22/03 have been fully considered but they are not persuasive.

For the first time, applicants argue that the claimed formulation acts synergistically to provide surprising benefits. It is not clear if applicants are asserting “unexpected results.” If they are, then the assertions must be couched in terms of unexpected results. It is first noted that applicants do not point to any specific data to show synergistic or surprising results, much less unexpected results. Therefore, the assertion is not found persuasive.

Applicants also assert “the present situation is analogous to Genus-Species determinations in that her fact that a claimed species or subgenus is encompassed by a prior art genus is not sufficient by itself to establish a prima facie cases of obviousness.” This determination is discussed in MPEP 2144.08. This analysis is used “to assist Office personnel in the examination of applications which contain claims to species of a subgenus of chemical compositions” “These guidelines do not constitute substantive rule making and hence do not have the force and effect of law.” Part II , of this section, states that the “patentability of a claim to a specific compound or subgenus embraced by the prior art genus should be analyzed no differently” Here, applicants do not claim a specific compound, but a rather broad recipe

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for formulating a food or drink, that could, in fact claim what the prior art discloses. In fact, the prior art, in many respects is narrower than that claimed.

Applicants discuss that claimed products' perceived positive mood and energy characteristics and how these are dependent upon the GI of the product. Because the prior art product inherently possesses the claimed GI of "about 55," the prior art also possesses said characteristics. Applicants refer to their examples to support these perceived characteristics. It is noted that the GI of these products are about 20 to 25 rather than the claimed about 55. Further, the examples disclose very specific ingredients and amounts and therefore it is not conclusive that the characteristics are based solely on the GI.

Applicants also argue that the prior art does not disclose the claimed "kit." These claims recite a kit that includes the composition of claim 1 and information that the use of said composition provides one or more of the recited benefits, such as "energy." In fact, the product, Cinagro, is labeled "Cinagro Energy Plus Whole Body Tonic." Therefore, the limitation is met.

Lastly, it is noted that applicants make no mention of the second piece of prior art that is cited in the rejection, specifically their admission of the prior art with respect to the GI. To be fully responsive to this Office action, applicant must provide comments as their admissions.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO**

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MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis E. Sherrer whose telephone number is 703-308-3847. The examiner can normally be reached on Tuesday-Friday, 8AM-6:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-305-3602 for regular communications and 703-305-3602 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

A handwritten signature in black ink, appearing to read 'Curtis E. Sherrer', with a long horizontal flourish extending to the right.

Curtis E. Sherrer, Esq.
Primary Examiner
December 10, 2003